

STATE OF MICHIGAN
COURT OF APPEALS

SHARON LEE SCHELLENBERG and DAVID
W. RIGGLE,

UNPUBLISHED
May 29, 2008

Plaintiffs-Appellants,

v

BINGHAM TOWNSHIP,

No. 274403
Leelanau Circuit Court
LC No. 06-007129-CZ

Defendant-Appellee.

Before: O'Connell, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

Plaintiffs Sharon Lee Schellenberg and David W. Riggle appeal as of right the trial court's orders granting summary disposition to defendant Bingham Township (Township) on their complaint filed pursuant to the Freedom of Information Act (FOIA), MCL 15.231 *et seq.*, and the Open Meetings Act (OMA), MCL 15.261 *et seq.*, to obtain the minutes of a closed session held by the Township board. Plaintiffs also appeal the trial court's order denying their motion for leave to amend the complaint. Because the minutes of the closed session were exempt from disclosure under MCL 155.243(1)(v) and because the trial court did not abuse its discretion in denying plaintiffs' motion for leave to amend the complaint, we affirm.

I. Background

Sometime before September 2005, plaintiffs sued Bingham Township for failure to comply with the Land Division Act and the Bingham Township Land Division Ordinance (the LDA lawsuit). On September 12, 2005, the Township board, which consisted of five members, held a special meeting to discuss the LDA lawsuit. Present at the start of the meeting were three board members, Robert Foster, Dorothy Petroskey, and Nicki Hursey. Upon motion, they voted to go into a closed session. They invited into the closed session Angela Friske, the Township assessor, Robert Gregory, the Township planning commission chairman, Mike Jasinski, the zoning board of appeals chairman, and Dick Ford, the Township attorney. A fourth board member, Mary Bush, arrived approximately five minutes later and joined the closed session. Two hours later, Bush and the other three board members voted to return to an open meeting.

On October 2, 2005, Schellenberg submitted a FOIA request to the Township for the minutes of the September 12, 2005 meeting. In her request, Schellenberg stated that she was entitled to the minutes of the closed session because it was held in violation of the OMA.

Because plaintiffs only requested equitable damages, not monetary damages, in the LDA lawsuit, plaintiffs maintained an open meeting would not have had a financial detriment on the Township. The Township provided Schellenberg with the minutes of the meeting but stated that the “portion of the meeting that was held in closed session [was] sealed and [was] not available for public distribution.”

Thereafter, plaintiffs commenced the present action. Plaintiffs sought a declaration that the Township’s refusal to disclose the minutes of the closed session was unlawful, an order requiring the Township to make the minutes available to them, and an injunction enjoining the Township from further noncompliance with the OMA.

The parties cross-moved for summary disposition. The trial court granted summary disposition to the Township on plaintiffs’ FOIA claim, finding that the minutes of the closed session were exempt from disclosure under MCL 15.243(1)(v) as information relating to a civil action to which plaintiffs and the Township were parties. Although the trial court found that the Township “technically violated” the OMA when the board entered into the closed session with only “a three-fifths vote” of the board members calling for the closed session, it granted the Township an opportunity to reenact the vote. Then, upon receiving briefs from the parties regarding whether the reenactment cured the OMA violation, the trial court would decide plaintiffs’ OMA claim.

On September 19, 2006, the Township held a special board meeting. Present at the meeting were four board members, Foster, Hursey, Bush, and Steve Voisin.¹ Agreeing to reenact the September 12, 2005 vote, the four board members voted affirmatively to enter into the closed session.

Upon hearing the parties’ arguments, the trial court, finding that the board’s reenactment of the September 12, 2005 vote to enter into the closed session complied with the OMA, granted summary disposition to the Township on plaintiffs’ OMA claim. While recognizing the Township “technical[ly] violat[ed]” the OMA, the trial court denied plaintiffs’ request for court costs and actual attorney fees because plaintiffs did not obtain any relief. “There was no order to do anything different, no finding that something was done wrong.”

II. The Freedom of Information Act

This Court reviews de novo a trial court’s decision on a motion for summary disposition. *Healing Place at North Oakland Medical Ctr v Allstate Ins Co*, 277 Mich App 51, 55; 744 NW2d 174 (2007). The Township moved for summary disposition under MCR 2.116(C)(8) and (10). Because the Township relied on documentary evidence to support its motion, we will proceed under the standards applicable to a motion made under MCR 2.116(C)(10). *Id.* A motion under MCR 2.116(C)(10) tests the factual support for a claim, *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003), and should be granted when there is no genuine issue of

¹ Voisin was absent from the September 12, 2005 meeting. Peggy Core had replaced Petroskey on the Township board, but Core was absent from the September 19, 2006 meeting.

material fact and the moving party is entitled to judgment as a matter of law, *Amerisure Ins Co v Coleman*, 274 Mich App 432, 434; 733 NW2d 93 (2007).

“The purpose of FOIA is to provide all persons, except those persons incarcerated in state or local correctional facilities with ‘full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees.’” *Taylor v Lansing Bd of Water & Light*, 272 Mich App 200, 204; 725 NW2d 84 (2006), quoting MCL 15.231(2). The FOIA mandates a policy of full disclosure. *Stone Street Capital, Inc v Bureau of State Lottery*, 263 Mich App 683, 687; 689 NW2d 541 (2004). A public body must disclose all public records not specifically exempt. MCL 15.233(1); *Scharret v Berkley*, 249 Mich App 405, 411; 642 NW2d 685 (2002).

The trial court granted summary disposition to the Township on plaintiffs’ FOIA claim on the basis that the minutes of the closed session were exempt from disclosure under MCL 15.243(1)(v), which exempts from disclosure “[r]ecords or information relating to a civil action in which the requesting party and the public body are parties.” Plaintiffs assert the trial court erred in relying on MCL 15.243(1)(v) because the Township did not list this exemption in its letter denying their FOIA request, nor did the Township list the exemption as an affirmative defense in its answer to the complaint.² Because plaintiffs failed to raise this argument before the trial court, the issue is not properly preserved for appellate review. *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 162-163; 742 NW2d 409 (2007).

Addressing the issue under the plain error standard, see *In re Egbert R Smith Trust*, 274 Mich App 283, 285; 731 NW2d 810 (2007), aff’d 480 Mich 19 (2008), we find no plain error affecting plaintiffs’ substantial rights. Pursuant to MCL 15.235(4), a public body, in a written notice denying a FOIA request, shall provide the basis for its determination of why the requested documents are exempt from disclosure. In its written notice to plaintiffs, the Township did not cite MCL 15.243(1)(v) as the basis for its determination for why the minutes of the closed session were exempt from disclosure. However, a public body does not waive an exemption as a defense by failing to list the exemption in its written notice denying the FOIA request. *Residential Ratepayer Consortium v Pub Service Comm #2*, 168 Mich App 476, 480-481; 425 NW2d 98 (1987); see also *Stone Street Capital, Inc, supra* at 688 n 2 (“[A] public body may assert for the first time in the circuit court defenses not originally raised at the administrative level”). Accordingly, the Township’s failure to cite MCL 15.243(1)(v) in its written notice denying plaintiffs’ FOIA request did not preclude the Township from raising the exemption before the trial court.

FOIA exemptions are affirmative defenses to a request for disclosure. *Messenger v Dep’t of Consumer & Industry Services*, 238 Mich App 524, 536; 606 NW2d 38 (1999). A party waives an affirmative defense unless the defense is set forth in the party’s first responsive pleading. MCR 2.111(F)(2); *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 8; 614

² Below plaintiffs argued that the minutes of the closed session were not exempt from disclosure under MCL 15.243(1)(v) because the presence of Friske, Gregory, and Jasinski destroyed the attorney-client privilege. Plaintiffs do not make this argument on appeal.

NW2d 169 (2000). The Township did not specifically list MCL 15.243(1)(v) as an affirmative defense in its answer. However, it listed the FOIA as an affirmative defense. In addition, in responding to plaintiffs' factual allegations, the Township stated the closed session "was to discuss Plaintiffs' lawsuit against the Township" and the purpose of the closed session "was to discuss Plaintiffs' litigation against this Defendant with Defendant's attorney." Thus, the Township's answer, when read as whole, placed plaintiffs on notice that the Township might rely on MCL 15.243(1)(v) as the basis for its denial of plaintiffs' FOIA request. In addition, pursuant to MCR 2.118(A)(2), a trial court shall freely grant a party leave to amend a pleading. There is nothing in the record to indicate that had plaintiffs argued below that, by failing to specifically plead MCL 15.243(1)(v) as an affirmative defense, the Township waived the exemption as a defense, the trial court would have denied a motion by the Township to amend its affirmative defenses. Accordingly, there was no plain error affecting plaintiffs' substantial rights when the trial court allowed the Township to rely on MCL 15.243(1)(v) as a basis for denying plaintiffs' FOIA request. Because the minutes of the closed session relate[ed] to a civil action to which plaintiffs and the Township were parties, the trial court properly granted summary disposition to the Township on plaintiffs' FOIA claim.³

Consequently, because the minutes of the closed session are exempt from disclosure, plaintiffs are not entitled to costs and attorney fees on their FOIA claim. See *Detroit Free Press, Inc v Dep't of Attorney Gen*, 271 Mich App 418, 420; 722 NW2d 277 (2006) ("Attorney fees are available under [MCL 15.240] if a public body, in a final determination, denies an information request and the court orders production of the documents").⁴

Plaintiffs also raise various challenges to the trial court's finding that the Township, by reenacting the board's September 12, 2005 vote to enter into the closed session, cured the earlier "technical violation" of the OMA. We find it unnecessary to address these issues. The gravamen of plaintiffs' one count complaint was that the Township improperly denied their FOIA request for the minutes of the closed session because the minutes were not exempt from disclosure under MCL 15.243(1)(d), the ground initially relied upon by the Township in denying

³ The Township also claims that its refusal to disclose the minutes of the closed session was proper under MCL 15.243(1)(d) (exempting from disclosure records specifically exempt from disclosure by statute) or MCL 15.243(1)(g) (exempting from disclosure records subject to the attorney-client privilege). However, because the minutes of the closed session were exempt from disclosure under MCL 15.243(v)(1), it is unnecessary for us to address whether these two subsections exempted the minutes from disclosure.

⁴ We agree with plaintiffs that the Township violated the FOIA when, in its written notice denying plaintiffs' FOIA request, it failed to advise plaintiffs of their right to seek an administrative or judicial appeal and their right to receive attorney fees should a trial court order the disclosure of the requested document. See MCL 15.235(4)(d) and (e). However, a violation of MCL 15.235 only renders an award of attorney fees when a trial court "determines that the public body has not complied with this section *and* orders disclosure of all or a portion" of the requested document. MCL 15.235(4)(e) (emphasis added). Thus, while the Township failed to comply with MCL 15.235(4)(d) and (e), plaintiffs are not entitled to attorney fees because the trial court never disclosed the minutes of the closed session.

the FOIA request, as the closed session was held in violation of the OMA. Although plaintiffs brought the action under the FOIA and the OMA, the relief requested under each act was the production of the minutes of the closed session. In fact, to obtain the disclosure of the minutes, plaintiffs were required to plead an OMA violation. See *Local Area Watch v Grand Rapids*, 262 Mich App 136, 143; 683 NW2d 745 (2004) (“We hold that where relief is sought only under the FOIA, judicial review is not available under the OMA to go into closed session and thereby exempt minutes of that meeting from disclosure under the FOIA”). Accordingly, plaintiffs’ allegation in their complaint that the Township violated the OMA did not constitute a separate claim for relief. Rather, the allegation formed the basis for which the trial court could grant the FOIA relief plaintiffs sought. Having determined that the trial court properly concluded that the minutes of the closed session were exempt from disclosure under MCL 15.243(1)(v), we need not decide whether the minutes were exempt from disclosure under MCL 15.243(1)(d). Consequently, we need not decide whether the Township entered into the closed session in violation of the OMA.

III. Motion for Leave to Amend the Complaint

Plaintiffs claim the trial court erred in denying their motion for leave to amend the complaint. The proposed amended complaint listed numerous additional violations of the FOIA and the OMA. According to plaintiffs, it was of “critical importance” that the trial court grant leave to amend so that all of the Township’s OMA violations would be made in one lawsuit, thereby evidencing the need for an injunction. To grant leave to a party to amend a pleading is within the trial court’s discretion. *PT Today, Inc v Comm’r of the Office of Financial & Ins Services*, 270 Mich App 110, 142; 715 NW2d 398 (2006). This Court will not reverse a trial court’s decision on a motion for leave to amend unless it constituted an abuse of discretion that resulted in injustice. *Id.* An abuse of discretion occurs when the trial court’s decision is outside the range of reasonable and principled outcomes. *In re Kostin Estate*, 278 Mich App 47, 51; ___ NW2d ___ (2008).

A trial court should freely grant leave to amend a complaint when justice so requires. MCR 2.118(A)(2); *Miller v Chapman Contracting*, 477 Mich 102, 105; 730 NW2d 462 (2007). Because “amendment is generally a matter of right rather than grace,” “a motion to amend should ordinarily be denied only for particularized reasons, including undue delay, bad faith or a dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or futility.” *PT Today, Inc, supra* at 143. While the trial court did not deny plaintiffs’ motion for one of the “particularized reasons,” we are unable to conclude the trial court abused its discretion in denying the motion for leave to amend. The trial court had just disposed of the claims in the present case, and none of the newly alleged FOIA or OMA violations involved the October 2, 2005 FOIA request or the September 12, 2005 closed session. In addition, the trial court’s decision to deny the motion for leave to amend did not prejudice plaintiffs by prohibiting them from showing the need for an injunction. The proposed complaint contained numerous alleged OMA violations by the Township. Thus, if plaintiffs filed a new complaint and proved the violations, plaintiffs had the ability to establish the need for an

injunction requiring the Township to comply with the OMA. The trial court did not abuse its discretion in denying plaintiffs' motion for leave to amend the complaint.

Affirmed.

/s/ Peter D. O'Connell

/s/ Joel P. Hoekstra

/s/ Michael R. Smolenski